

**Docket No:** 09-0166/  
09-0167 Consol.  
**Bench Date:** 10/20/10  
**Deadline:** N/A

**MEMORANDUM**

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**TO:** The Commission

**FROM:** Leslie Haynes, Administrative Law Judge

**DATE:** October 4, 2010

**SUBJECT:** North Shore Gas Company

Proposed general increase in natural gas rates. (Tariffs filed on February 25, 2009)

The Peoples Gas Light and Coke Company

Proposed general increase in natural gas rates. (Tariffs filed on February 25, 2009)

**RECOMMENDATION:** Deny the AG's Motion for Stay of Rider ICR.

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This matter concerns the proposed general increase in rates for gas service requested by North Shore Gas Company and The Peoples Gas Light and Coke Company (hereinafter "NS/PGL" or the "Companies"). The Commission entered a Final Order in this proceeding on January 21, 2010 and an Order on Rehearing on June 2, 2010. On June 17, 2010, the People of the State of Illinois (the "AG"), filed a "Motion for a Partial Stay of the Commission's January 29, 2010 Order and a Stay of the Commission's June 2, 2010 Order, or, in the Alternative, Motion for Collection of Rates Subject to Refund" (the "Motion"). On July 1, 2010, the Companies filed a Response to the Motion and on July 8, 2010, the AG filed a Reply to the Response.

The Motion concerns the AG's appeal of the Commission's Order approving rates that will be collected under Peoples Gas' Rider ICR (Infrastructure Cost Recovery), which will take effect in April of 2011. Rider ICR concerns the replacement of Peoples Gas' cast iron and ductile iron mains and associated infrastructure. The AG seeks a stay of Rider ICR pending the resolution of the appeal of the Orders at issue.

**AG's Motion**

The AG asserts that a partial stay of the Commission's Order pending resolution of its appeal is necessary to preserve the status quo during the appellate review of the

Commission's Order. According to the AG, the Commission is guided by the same factors traditionally used by courts when evaluating whether the grant of a stay is appropriate: (1) the irreparable harm petitioner will suffer if the stay is denied; (2) the harm to other parties that would result from the issuance of a stay; and (3) the petitioner's likelihood of prevailing on the merits.

With respect to its likelihood of prevailing on the merits, the AG states that the Commission's decision approving Rider ICR raises a legal issue of first impression that effectively insulates these rates from the test year ratemaking process for 20 years. Also, the AG asserts that Rider ICR violates the rule against single issue rulemaking. According to the AG, the Commission's approval of Rider ICR is not contemplated by the Public Utilities Act (the "Act") or Illinois court rulings reviewing past Commission-approved riders. The AG asserts that the lack of legal support or precedent for Rider ICR at the Commission and under Illinois law raises a fair question as to the sustainability of the rider and the success of the appeal.

Failure to grant a stay of Rider ICR, the AG maintains, will cause irreparable harm to hundreds of thousands of Peoples Gas residential, commercial and industrial customers because ratepayers will have to pay an additional \$8.2 million in 2011, \$21.3 million in 2012 and \$25.4 million in 2013. Further, the AG notes that because the main replacement will continue for the next 20 years, the surcharges will also be in place that long.

According to the AG, a stay of the implementation of Rider ICR tariffs does not threaten irreparable harm to the Companies' financial condition.

In the alternative, the AG requests that the ICR rates be collected subject to refund. According to the AG, unless the Commission grants this alternative request, ratepayers will be irreparably harmed. Collecting rates subject to refund, the AG argues, protects ratepayers from illegal and excessive rates that cannot be refunded.

### **NS/PGL Response**

NS/PGL also addressed the three factors that must be met in order for a stay to be granted. With respect to the likelihood of success on the merits, NS/PGL point out that the AG has simply reiterated the same arguments that it made in the six prior briefs in this proceeding and at oral argument.

The Companies note that the only irreparable harm that the AG claims is the inability to refund the funds collected through Rider ICR. According to the Companies, this is insufficient to establish irreparable harm. The rider is designed to only pass through actual incremental costs for infrastructure put into the ground and is subject to an annual prudency review. Because of this prudency review, NS/PGL assert that the AG has failed to show any harm, let alone irreparable harm.

According to NS/PGL, the AG's Motion fails to address potential harm to other parties. They note that Rider ICR will help enable the acceleration of Peoples Gas' main replacement program which will benefit Peoples Gas' customers, the City of Chicago and the people working on Peoples Gas' system. The benefits include enhancing system safety, making available more energy efficient appliances, reducing environmental impacts, enhancing safety for gas workers, creating jobs and saving costs. A stay of Rider ICR would delay the receipt of these benefits by customers. NS/PGL also point out that Rider ICR includes a factor designed to flow a portion of the savings created by Rider ICR back to customers (with the remaining construction cost savings benefiting customers through traditional ratemaking).

In response to the AG's requested alternative relief, NS/PGL argues that it is inappropriate and overbroad. NS/PGL interpret the AG's alternate request to be that all the revenue collected pursuant to the Commission's Order should be subject to refund, not just the Rider ICR revenue. Further, NS/PGL assert that the AG fails to cite any support for the authority of the Commission to order that rates be collected subject to refund.

### **AG's Reply**

In its reply, the AG clarifies that the alternative relief requested in its Motion was limited to Rider ICR revenues.

In arguing that it has met the criteria of likelihood of success on the merits, the AG asserts that it is sufficient to present a substantial case on the merits and to show that the balance of equitable factors weighs in favor of granting the stay. In response to NS/PGL's argument that the Commission has already rejected the AG's arguments, the AG states that this does not mean it is unlikely to prevail on the merits. The AG argues that the Commission's approval of Rider ICR is a question of law and, thus, not binding on a reviewing court.

With respect to irreparable harm, the AG asserts that if the First District Appellate Court sides with the AG in its appeal, the Rider ICR rates already collected will be lost and irretrievable. The AG notes that not only will the money be irretrievable by ratepayers if the motion is denied, but also that NS/PGL did not show that the acceleration plan was necessary for safety and reliability or that rider recovery was financially necessary. Further, the AG contends that the annual reconciliation process does not constitute the equivalent examination of prudence and used and usefulness that accompanies the traditional ratemaking process.

Additionally, the AG now urges the Commissioners to look to the public comments filed on the Commission's e-docket as well as the transcripts from the Open Meetings where People Gas' customers appeared in deciding whether there will be irreparable harm to ratepayers if the Motion is not granted.

The AG states that the issuance of a stay, or collection of Rider ICR revenues subject to refund, will not affect the safety of Peoples Gas' distribution system, the Company's ability to upgrade its distribution system or in any way harm Peoples Gas. The AG points to testimony of Staff and AG/CUB witnesses that the Company did not show that revenues to be collected under Rider ICR were necessary to enable the acceleration of the main replacement program. The AG also notes that the Company failed to provide evidence of harm to Peoples Gas or others, but merely pointed to the benefits of main replacement.

### **Analysis and Recommendation**

After reviewing the AG's Motion, the Companies' Response and the AG's Reply, I recommend that the AG's Motion be denied in its entirety. The legal test for whether a stay is warranted has been articulated by the Commission as follows:

In deciding whether or not to grant a stay of the effectiveness of [an] Order. . . [the Commission] should be guided by the traditional factors used by reviewing courts to grant interlocutory injunctive relief. . . : (1) the petitioner's likelihood of prevailing on the merits; (2) the irreparable harm petitioner will suffer if the stay is not granted; and (3) the harm to other parties which would result from the issuance of a stay.

*In re Commonwealth Edison Co.*, Docket 87-0427 at 2 (Order, Jan. 8, 1993) (citing *City of Chicago v. Ill. Commerce Comm'n*, 133 Ill. App. 3d 435 (1st Dist 1985)). It is difficult to weigh the AG's likelihood of success for several reasons.

Very recently, the Appellate Court issued its decision on the AG's appeal of Commonwealth Edison Company's Rider SMP (well after briefs were filed on this Motion). The court overruled the Commission's approval of that rider. As far as I am aware, Rider SMP is the only other infrastructure rider approved by the Commission, other than Rider ICR. Notably, and contrary to the AG's suggestion, the approval of a rider is a mixed question of fact and law. The factual issues - whether the mains should be replaced on the timeline adopted by the Commission and the types of costs that are involved - are entwined with the legal basis for rider approval. For this reason, it cannot be said with any certainty that the Rider SMP decision will control.

Furthermore, the Commission's decision on Rider ICR contains a more detailed legal analysis than Rider SMP and it is being appealed in a different district. In addition, the AG raises no argument that has not been thoroughly considered and rejected by the Commission. For these reasons, the AG has not, in my opinion, made a strong showing that its position will succeed on appeal.

In its reply, the AG avers that it is not required to show a probability of success on the merits, but that it is sufficient to present a substantial case on the merits and

show that the balance of equitable factors weighs in favor of granting the stay. Contrary to the AG's position, when public safety is considered, equity and the public interest weigh in favor of denying the stay. Reliability and public safety concerns weighed heavily in the Commission's analysis of Rider ICR in its Final Order and cannot now be ignored.

It is undisputed that these mains need to be replaced. If the Commission wants these mains replaced on the 20-year expedited schedule that it adopted in the Final Order, Rider ICR allows the Commission to direct that the mains be replaced within that timeframe. If the stay were granted, Peoples Gas would presumably revert to its 50 year completion schedule and replace roughly 45 miles of mains per year. After reviewing all the evidence in the rate case, the Commission adopted the 20-year accelerated program due to the many benefits for ratepayers.

Moreover, contrary to the thrust of the AG's argument, infrastructure costs are typically recoverable from ratepayers. Thus, the Commission had to either approve higher base rates or the rider. Although the AG states that more money will be recovered for the replacement of these mains through rider recovery versus base rate recovery, the evidence is equivocal and difficult to quantify. The benefits listed by Peoples Gas and the Final Order outweigh the unquantified higher rates that customers will pay by having these costs recovered through a rider versus base rates. Accordingly, the balance of equitable factors weighs against the granting of the stay.

The AG has shown no irreparable harm to warrant a stay or a sequestration of rider revenue. The AG's argument that the public comments filed on the Commission's e-docket system are evidence of the irreparable harm that will be suffered by the Companies' customers is baseless. Unverified statements by residents of Illinois (not necessarily customers of Peoples Gas) that have not been subject to cross examination cannot be relied on by the Commission to show anything except that this proceeding has engendered public interest and comment.

With respect to the alternative relief requested, the AG has provided no authority for the Commission to grant the request. The main replacement costs are subject to recovery from customers in any event. Whether collected through traditional rates or a rider, infrastructure investments are costs that can traditionally be recovered from ratepayers. Thus, it would be improper to refund the money to ratepayers after the Company has made the investment in reliance on Rider ICR.

For these reasons, I strongly recommend that the Commission deny the AG's Motion - both the request for a stay of Rider ICR and the alternative of refunding the Rider ICR rates.

LH:jt